No. 18,272

United States Court of Appeals

For the Ninth Circuit

GRACE TURNER,

Appellant,

vs.

THE MANHATTAN LIFE INSURANCE COMPANY, a New York Corporation,

Appellee.

APPELLEE THE MANHATTAN LIFE INSURANCE COMPANY'S PETITION FOR A REHEARING

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PETITION FOR A REHEARING

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Appellee requests a rehearing by this court limited to two issues:

(1) Under the doctrine of *noscitur a sociis*, as applied in this circuit, does the word "hospital" (as that word appears in question 19 of the insurer's application, i.e., "Have you ever been an inmate of, or received treatment or cure at any asylum, *hospital*, or sanitarium?"), refer *only* to a *mental* hospital in appellee's and all other similarly worded insurance applications?

(2) May the court, relying on inferences of its own contrary to the standard of appellate review in *this* circuit set forth in the recent case of *Lundgren v. Freeman*, 307 F.2d 104, (CA 9, 1962), set aside the specific findings of the trial court which are supported by uncontradicted testimony and reasonable inferences.

Turning to the first issue. The insured answered "No" to question 19 quoted above. The trial court, however, found that the insured was hospitalized in Hahnemann Hospital "within *four months* of the date of his application for insurance" (Finding 6); that accordingly, his answer of "No" to question 19 was "false" (Findings 1 and 2); and that his false answer "did not result from *inadvertence* or *misunderstanding*" of the question's purport . . . but was "*knowingly* made in *bad faith.*" (Finding 8.) The trial court also found that: "The defendant . . . relied on . . . such material misrepresentation and would not have issued the subject policy . . . had it been aware of the true facts concerning his physical condition which were *concealed* by his *misrepresentations.*" (Finding 11.) (Emphasis added.)

Suggesting that the moving force behind the insured's application was the pressure of the insurer's agents* (and

*The court apparently believes that because the insured's mortality rate was 350% of standard mortality, the premium charged

not the insured's need of obtaining "key-man" insurance as security for a loan to his company), the reviewing court overturned these specific findings as to falsity, bad faith, concealment and misrepresentations on the belief that the word "sanitarium" in question 19 referred to a *mental* sanitarium, and therefore, applying the doctrine of *noscitur a sociis,* the word "hospital" referred to a *mental* hospital.

But does the word "sanitarium" clearly refer to an institution for *mental* disorders? In the absence of any cited authority in the court's opinion, counsel can only turn to the recognized sources of the interpretation of language: the standard dictionaries, the medical dictionaries, the legal texts, the adjudicated cases, and, on a popular but nevertheless revealing level, the "yellow pages" of the San Francisco Telephone Directory.

Webster's Third New International Dictionary (1961) (2720 pages) defines sanitarium (sanatorium) as:

> "I: An establishment that provides therapy by physical agents (as hydrotherapy, light therapy) combined with diet, exercise, and other measures for treatment or rehabilitation. 2a: An institution for rest and recuperation esp. for invalids and convalescents. b: An establishment for the treatment of the sick *esp. if suffering from chronic disease* (as alcoholism, tuberculosis, nervous and mental disease) requiring protracted care." (Emphasis added.)

The leading medical dictionaries, the cases, and the classified section of the San Francisco Telephone Directory are *all* to the same effect. (See appendix.)

Nowhere has counsel been able to find authority for the limited construction given the word "sanitorium" (much less the word "hospital") by the court.

Moreover, to apply such a restricted meaning to these common English words, so that three mental institutions

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was 350% of standard. (op. p. 7) This is incorrect. The premium charged ($1819.00) was $767.50 more than the standard premium of $1,051.50.

but *no general hospitals* are deemed referred to in the insurer's detailed medical questionnaire, is to unsettle every similarly worded insurance contract in this circuit and to permit insureds who have been hospitalized for alcoholism, tuberculosis, cancer, heart disease, etc., to avoid disclosure of such hospitalization in their applications for insurance—a situation well illustrated by the present case where plaintiff's "No" answer to question 19 prevented the insurer from contacting Hahnemann Hospital and obtaining the tell-tale record that the insured had suffered a stroke four months before his application for insurance.

To turn now to the question of whether, under Federal Rule 52(a), as applied in this circuit, *Lundgren v. Freeman, supra,* specific findings of the trial court supported by both uncontradicted testimony and reasonable and necessary inferences may be set aside in reliance on contrary inferences drawn by *this* court as to what *might* have been the testimony of an uncalled witness.

Question 16 of the insurer's application asked the prospective insured whether he had "ever suffered from any ailment or disease of . . . (b) the *heart, blood vessels* or lungs." The insured answered "No." The trial court found this answer was "*false*"; that it "did not result from *inadvertence* or *misunderstanding*" but was "*knowingly* made in *bad faith*"; and that the policy would not have been issued had the company "been aware of the true facts concerning his physical condition which were *concealed* by his misrepresentations." (Findings 4, 5, 8, and 11.) These findings are supported by substantial evidence and reasonable and necessary inferences.

There is no dispute that "In December, 1957, a little more than a year before the application, Andre experienced a ten-day episode of chest pains for which he consulted his doctor on December 26, 1957 and was advised by his doctor on December 30, 1957 that such pains constituted angina pectoris and resulted from coronary in-

sufficiency." (Finding 7.) And it is the uncontradicted testimony of the insurer's medical director, that the insurer had no knowledge that the insured ever had angina or chest pains—vital medical information, as pointed out by the three doctors who testified, in determining whether the insured had an "arrested" or "active" heart disease. (Dissenting opinion.)

The court does not dispute the materiality of the insurer's lack of knowledge of this episode. Instead the court, contrary to the inference of the trial court, infers that the examining doctor, who did not testify, was given such information by the insured but failed to pass it on to the company.

The trial court in its findings *necessarily* inferred no such information was given the examining doctor, and its inference being reasonable is not reversible on appeal even though in a trial *de novo* this court might infer otherwise. *Lundgren v. Freeman, supra.*

Specifically, question 12 of the insured's statements to the medical examiner asks "Have you ever . . . had an electrocardiogram? If yes, state when, by whom made and explain purpose?" The recorded statement of the insured is "Yes, Dr. Holliger." The court *assumes* this statement refers to the EKG made on December 26, 1957, the day the insured reported his chest pains to Dr. Holliger, his own doctor. It then makes the further and much more important assumption that the insured told the insurer's examining doctor of the angina attack *because* it would have been fraudulent for him not to have done so.

In assuming the EKG referred to in answer to question 12 was the one made in 1957, this court has overlooked the fact that Dr. Holliger made two other EKGs, one of which the examining doctor knew about. (p. 32 Ex. Holliger Dep.) But no matter which of the three Holliger EKGs was referred to, the trial court *necessarily* inferred the insured said nothing to the examining doctor about the angina attack.

This was a reasonable inference for the trial court to make in view of the fact the insured *stated* in his application that he had read the recorded answer and that it was "correctly written *as given.*"

Since nothing appears in the application about the angina attack, since the insured's doctor in his correspondence with the insurer did not disclose the angina attack (opinion, p. 4), and since the defendant's medical director testified he was given no knowledge of the angina attack (Dep. LaPointe, pp. 8, 9), it was perfectly reasonable and surely *not* clearly erroneous of the trial court to conclude that knowledge of the attack was knowingly withheld from the insurer (including its examining doctor) by the insured.

The clearly erroneous rule is the *only* standard of appellate review of trial court inferences in this circuit—anything else on *this* record is a trial *de novo.* Fed. Rule 52(a), *Lundgren v. Freeman, supra.*

But make no mistake, henceforth the court's opinion will be read as inexplicably discarding the *Lundgren* rule as the rule of appellate review of trial court findings based on written evidence and inferences of fact in insurance cases.

Because of the conflict between the court's opinion and the holding of another division of the court in *Lundgren v. Freeman, supra,* on the issue of appellate review of trial court findings based on both written evidence and inferences of fact, appellee suggests this re-hearing be held *en banc.*

Respectfully submitted,

James F. Thacher,
Thacher, Jones, Casey & Ball,
Attorneys for Appellee
and Petitioner.

(Appendix Follows)

Appendix.

Appendix

Dorland's Medical Dictionary, Twenty-third Edition (1961) (1598 pages) reads:

> "Sanatorium (L. *sanatorius* conferring health, from *sanare* to cure) L. an establishment for the treatment of sick persons, especially a private hospital for convalescents or those who are not extremely ill. The term is now applied particularly to an establishment for the open-air treatment of *tuberculous* patients. 2. a health station; a health resort in a hot region." (Emphasis added.)

41 C.J.S. p. 331:

> "A sanitarium is a sanatorium, and a sanatorium is a hospital. In ordinary acceptation, a sanitarium is an institution for the medical treatment of sick persons, as well as for ministering to related needs of the patients. A sanitarium is a health station or retreat; also a boarding-house or other place where patients are kept and medical and surgical treatment given." (cases cited.)

People v. Gold, 6 N.Y.S. 2d 264, 268, states:

> "A sanitarium, according to Funk and Wagnalls, is sometimes synonymous with sanatorium which is a health retreat; an institution for the treatment of disease or care of invalids and especially an establishment employing natural therapeutic agents or some specific treatment."

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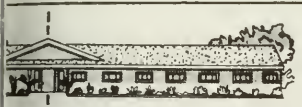

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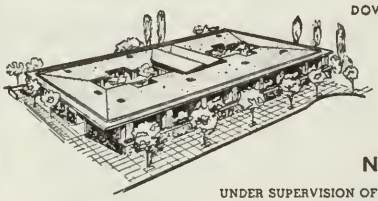

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